

STATE OF INDIANA) MARION COUNTY SUPERIOR COURT
) SS:
COUNTY OF MARION) CAUSE NO. 49D06-1010-PL-044336

INDIANA DEPARTMENT OF)
NATURAL RESOURCES)
)
Petitioner,)
)
)
DARLENE OGDEN)
)
Respondent.)

FILED
JUL 10 2012
Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. Findings of Fact

1. On May 20, 2010, Ogden retrieved a raccoon from a roadside where it had apparently been orphaned. R. at 21-22.
2. In order to possess a raccoon, one must have a permit issued by the IDNR [see 312 Ind. Admin. Code 9-11-1(a); 312 IAC 9-11-7(a)(8)]; however, pursuant to 312 Ind. Admin. Code 9-10-9(b), “an individual may, without a permit, take possession of a sick, injured, or orphaned wild animal and transport it to an individual with a [wild animal rehabilitation permit] within twenty-four (24) hours.”
3. Ogden did not have a wildlife rehabilitation permit when she obtained the raccoon. R. at 56.
4. After failed attempts to find a licensed wildlife rehabilitator who had room for the animal, Ogden kept and cared for the animal herself. R. at 22.
5. Ogden applied for a wild animal possession permit, but on July 12, 2010, the IDNR denied her application because the animal was not acquired illegally and ordered Ogden to

release the animal into the wild, to an IDNR conservation officer or to a licensed wildlife rehabilitator no later than July 30, 2010. R. at 56.

6. Ogden appealed this denial via fax dated July 15, 2010 to the Natural Resources Commission (“NRC”). R. at 53.

7. On July 26, 2010, the chief administrative law judge for the NRC issued an order granting a temporary stay regarding the order to release the animal until August 12, 2010 and setting the matter for stay hearing on August 11, 2010. R. at 47.

8. Ogden requested a continuance of the August 11, 2010 stay hearing due to her having moved to Oklahoma and not being able to return to Indiana at that time, to which request the IDNR objected. R. at 43.

9. An administrative law judge (“ALJ”) with the NRC granted the continuance until August 24, 2010 and extended the stay to August 25, 2010. R. at 37-38.

10. Ogden appeared and presented testimony and witnesses at the stay hearing held August 24, 2010. R. at 21. Even though Ogden returned to Indiana to attend the stay hearing herself, she did not bring the animal with her due to concerns regarding the animal’s welfare and failed attempts to contact the ALJ to see if the animal had to be returned for said hearing. R. at 23.

11. On August 25, 2010, the ALJ issued an *Entry With Respect to the Natural Resources Commissions’ [sic] Continuing Jurisdiction [sic] Over the Instant Proceeding, Notice of Proposed Dismissal and Order Regarding Stay of Effectiveness of Respondent, Department of Natural Resources’, Order to Release or Relinquish Possession of Raccoon* (the “*Entry Regarding Jurisdiction and Stay*”).

12. In the August 25, 2010 *Entry Regarding Jurisdiction and Stay*, the ALJ found that “the Commission lacks jurisdiction over the subject matter of this proceeding as a result of the removal of the raccoon from the State of Indiana.” R. at 23.

13. While the ALJ confirmed the animal remained the property of the State of Indiana, she found the Commission’s authority only reached to the boundaries of the State and that the Commission was “utterly without the authority to command Ogden to take an action outside Indiana’s jurisdictional borders” (i.e. return the animal to Indiana). R. at 23.

14. The ALJ also found such an order would be unenforceable and as such, the ALJ would not issue an order that was a “nullity on its face.” R. at 23-24.

15. The ALJ further found that Ogden no longer needed a wild animal possession permit issued by the State of Indiana by virtue of having removed both herself and the animal from the State. R. at 24.

16. The ALJ then expressed her determination that as long as the raccoon at issue was located outside the State of Indiana, the matters at issue were moot and the proceeding should be dismissed in its entirety. R. at 24.

17. The August 25, 2010 *Entry Regarding Jurisdiction and Stay* also requested motions regarding her determination that the matter was moot and should be dismissed. R. at 24.

18. The IDNR filed such a motion (R. at 6), yet the ALJ ultimately dismissed the proceeding via the September 7, 2010 *Final Order of Dismissal*. R. at 2.

19. In the Final Order, the ALJ did not discuss loss of jurisdiction in a general sense but concentrated on the context at hand, a wild animal possession permit denial.

20. The ALJ stated that the wild animal possession permit requirement only applied to a person who intended to possess a wild animal in the State of Indiana and that since the raccoon

was now outside the State of Indiana, Ogden had no interest in further pursuit of her appeal of the possession permit denial. R. at 2-3.

21. As such, the ALJ found the case was moot and should be dismissed entirely. R. at 3.

22. On October 7, 2010, the IDNR filed its Verified Petition for Judicial Review of the *Final Order*, specifically challenging the ALJ's conclusions regarding jurisdiction.

23. According to United State Postal Service records, Ogden received the Verified Petition October 28, 2010.

24. The administrative record was filed October 29, 2010.

25. The IDNR filed its brief June 30, 2011.

26. To date, Respondent has not filed any brief or appearance.

II. Conclusions of Law

1. The role of a court in judicial review of an agency action is limited by the Indiana Administrative Orders and Procedures Act ("AOPA"), which provides the exclusive means for judicial review of an agency action. Ind. Code § 4-21.5-5-1.

2. AOPA places the burden of demonstrating the invalidity of an agency action on the party that is challenging the agency action, and permits the court only to grant relief when the moving party demonstrates that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privileges, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; or unsupported by substantial evidence." I.C. § 4-21.5-5-14.

3. The burden of demonstrating the invalidity of an agency action is on the party asserting its invalidity. I.C. § 4-21.5-5-14.

4. A reviewing court is not required to accept erroneous conclusions of law made by administrative agencies. *Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 465 (Ind. 1993). However, the court may not reweigh conflicting evidence or judge the credibility of the witnesses, nor may the court substitute its judgment for that of the agency. *Indiana Alcoholic Beverage Comm'n v. River Road Lounge, Inc.*, 590 N.E.2d 656, 658 (Ind. Ct. App. 1992).

5. All wild animals within the State of Indiana, except those legally owned or held in captivity under a license or permit or otherwise excepted under applicable law, are the property of the people of Indiana. Ind. Code § 14-22-1-1. Additionally, according to Ind. Code § 14-22-10-5, "title to a wild animal illegally taken or accidentally killed in violation of this article or IC 14-2 (before its repeal) does not vest in the taker of the wild animal, but remains in the state."

6. Since it is undisputed that the raccoon is a wild animal subject to regulation and that Ogden did not have a permit to possess the raccoon, the raccoon is still the property of the State of Indiana.

7. Additionally, "a person may not take, carry, ship, transport, or accept for shipment or transportation outside Indiana a wild animal protected by Indiana law, except as provided in this article." I.C. § 14-22-10-3(a).

8. The ALJ's determinations regarding jurisdiction effectively wrest ownership from the State and render both Ind. Code § 14-22-10-3(a) and Ind. Code § 4-22-10-5 meaningless.

9. In a separate and distinct but similar context, the Indiana Court of Appeals confirmed in *dicta* that taking and transporting migratory birds across state lines without appropriate authorization would be a violation of the statutory prohibition regarding such transportation. *See Boushehry v. State*, 648 N.E.2d 1174, 1178-79 (Ind. Ct. App. 1995). The Court noted the verbs "to ship, transport, or carry, or to deliver or receive for shipment, transportation, or carriage in

any manner” all included conduct initiated within Indiana. *Id.* at 1179. The Court went on to say that “[b]ecause the prohibited conduct is initiated within our state, it is punishable here.” *Id.* (citing Ind. Code § 35-41-1-1 which states: (b) A person may be convicted under Indiana law of an offense if: (1) either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana”).

10. Since possessing a wild animal in the State of Indiana without a wild animal possession permit issued by the IDNR is a violation of Indiana law, that conduct is addressable under the authority and jurisdiction of the State of Indiana regardless of whether the person or the animal are both still in the State of Indiana.

11. Regardless of her good intentions, it is undisputed that Ogden did not have the necessary permit when she possessed the raccoon. As such, that conduct is within the jurisdiction and authority of the State of Indiana and surely the NRC more specifically, as the ultimate authority for the agency in charge of protecting Indiana’s wildlife.

12. If the ALJ’s conclusions regarding jurisdiction are upheld, the permit requirement and the prohibitions against transporting wild animals across state lines are meaningless. All one has to do is take the animal and make it across state lines in order to be safe from any type of prosecution or enforcement regarding those actions. This could potentially apply to other resources such as timber, for example. As such, the ALJ is incorrect in concluding the NRC had no jurisdiction in this matter.¹

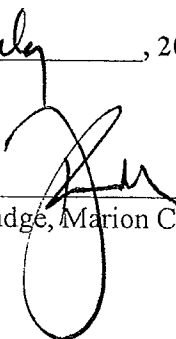
13. Therefore, the ALJ’s determination that the NRC did not have jurisdiction over this matter is arbitrary, capricious and not in accordance with law and should be reversed.

¹ While the ALJ in the *Final Order* did not discuss jurisdiction outside the loss thereof due to mootness, the ALJ’s discussion of jurisdiction in the *Entry Regarding Jurisdiction and Stay* send the message that all one must do is illegally possess an animal and leave the State to prevent the State from being able to address that violation of law. This is the concern the State is attempting to address and remedy via judicial review.

ORDER

Pursuant to Ind. Code § 4-21.5-5-15, this case is hereby remanded to the Natural Resources Commission for further proceedings consistent with this Order.

SO ORDERED THIS 10 DAY OF July, 2012.



Judge, Marion County Superior Court

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